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No. 84-590

In the Supreme Court of the United States

OCTOBER TERM, 1984

RED STAR MARINE SERVICES, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Occupational Safety and Health Administration retains jurisdiction to enforce a noise control standard, 29 C.F.R. 1910.95, promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, aboard an uninspected vessel in navigable waters, where no other federal agency has exercised authority to regulate the particular hazard or to regulate generally the working conditions of seamen aboard uninspected vessels.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 13

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Baltimore & O.R.R. v. *OSHRC*, 548 F.2d 1052 ..... 7, 9

Barger v. *Mayor & City Council*, 616 F.2d 730, cert. denied, 449 U.S. 834 11

Clary v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 ..... 10, 11

Columbia Gas of Pennsylvania, Inc. v. *Marshall*, 636 F.2d 913 ..... 6, 7

Dillingham Tug & Barge Corp., 10 O.S.H. Cas. (BNA) 1859 ..... 3, 4, 12, 13

Donovan v. *Texaco, Inc.*, 720 F.2d 825 10

Ensign-Bickford Co. v. *OSHRC*, 717 F.2d 1419, cert. denied, No. 83-1182 (Apr. 16, 1984) 6

Kopczynski v. *The Jacqueline*, 742 F.2d 555 12

Layne & Bowler Corp. v. *Western Well Work, Inc.*, 261 U.S. 387 10

Page

Cases—Continued:

Marshall v. *Northwest Orient Airlines, Inc.*, 574 F.2d 119 6

Organized Migrants in Community Action, Inc. v. *Brennan*, 520 F.2d 1161 7

PBR, Inc. v. *Secretary of Labor*, 643 F.2d 890 ..... 6, 7

Southern Pacific Transportation Co. v. *Usery*, 539 F.2d 386, cert. denied, 434 U.S. 874 ..... 6, 7, 8, 9

Southern Ry. v. *OSHRC*, 539 F.2d 335, cert. denied, 429 U.S. 999 ..... 6, 7, 9, 11

Taylor v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 11

U.S. Air, Inc. v. *OSHRC*, 689 F.2d 1191 8

Velasquez v. *Southern Pacific Transportation Co.*, 734 F.2d 216 7

Whirlpool Corp. v. *Marshall*, 445 U.S. 1 ..... 6, 12, 13

Statutes and regulations:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 12

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* :

§ 4(b)(1), 29 U.S.C. 653(b)(1) 3, 5, 6, 10, 11
§ 5(a)(2), 29 U.S.C. 654(a)(2) 2
§ 6(a), 29 U.S.C. 655(a) 12

Page

Statutes and regulations—Continued:

§ 11(b), 29 U.S.C. 660(b) 4
§ 12(j), 29 U.S.C. 661(j) 4
§ 17(k), 29 U.S.C. 666(k) 2

Pub. L. No. 98-89, § 1, 97 Stat. 500 *et seq.* :

97 Stat. 504 (to be codified at 46 U.S.C. 2101(33)) 2

97 Stat. 510 (to be codified at 46 U.S.C. 3301(7)) 2

97 Stat. 537 (to be codified at 46 U.S.C. 6301) 4

29 C.F.R. :

Pt. 1903:

Section 1903.4 (1978) 3

Pt. 1910:

Section 1910.95(a) 2
Section 1910.95(b)(3) (1980) 2
Section 1910.95(c)-(p) 2

Pt. 1915:

Section 1915.2(b) 12

Pt. 1918:

Section 1918.1 12

33 C.F.R. :

Pts. 60-76 8-9
Pt. 80 8
Pts. 151-159 8

Page

Statutes and regulations—Continued:

46 C.F.R. :

Pt. 24 8
Pt. 25:

Subpt. 25.05 (1982) 8
Subpt. 25.25 8
Subpt. 25.30 8

Pt. 26:

Subpt. 26.08 8
Subpt. 26.25:

Section 26.25-1 8

Pt. 31 8

Pt. 42:

Section 42.01-i 8

Pt. 71 8
Pt. 91 8

Miscellaneous:

43 Fed. Reg. 59838 (1978) 3

45 Fed. Reg. 14987 (1980) 8

48 Fed. Reg. 11365 (1983) 8

U.S. Coast Guard, *No. 12-82, Navigation and Vessel Inspection Circular* (June 2, 1982) 9

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RED STAR MARINE SERVICES, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 739 F.2d 774. The opinion of the administrative law judge (Pet. App. 26a-31a) is digested at 1983-1984 O.S.H. Dec. (CCH) ¶ 26,618. The opinion of the Occupational Safety and Health Review Commission (Pet. App. 32a-35a) is digested at 10 O.S.H. Cas. (BNA) 1967. The prior decision of the administrative law judge (Pet. App. 36a-43a) is digested at 1982 O.S.H. Dec. (CCH) ¶ 26,202.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-25a) was entered on July 10, 1984, and the petition for a writ of certiorari was filed on October 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a tugboat and marine towing service on the eastern seaboard of the United States (Pet. App. 3a, 39a). Petitioner's fleet includes the tugboat *Stamford*, an uninspected vessel under Coast Guard standards (*id.* at 8a, 39a).[1] On May 29, 1980, an Occupational Safety and Health Administration (OSHA) compliance officer, pursuant to an ex parte warrant, inspected the *Stamford* for safety and health violations (*id.* at 3a-4a). The compliance officer found that the *Stamford's* engineer was exposed to noise levels exceeding those permitted by regulation and that petitioner did not have a continuing and effective hearing conservation program, despite the fact that audiometric testing could have been implemented at a minimal cost (*id.* at 41a). Respondent Secretary of Labor accordingly cited petitioner with four "serious" violations[2] of Section 5(a)(2) of the Occupational Safety and Health Act (OSH Act or the Act), 29 U.S.C. 654(a)(2).[3]

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[1]Seagoing motor vessels, such as the *Stamford*, are subject to Coast Guard inspection if their weight exceeds 300 gross tons. See Pub. L. No. 98-89, § 1, 97 Stat. 510, 504 (to be codified at 46 U.S.C. 3301(7), 2101(33)). Because the *Stamford* weighs less than 300 gross tons (Pet. 5), it is classified as an "uninspected vessel." Although the Coast Guard has extensively regulated working conditions on inspected vessels, it has promulgated few regulations pertaining to safety matters on uninspected vessels. See pages 8-9, *infra*.

[2]A "serious" violation "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists * * * unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." § 17(k), 29 U.S.C. 666(k).

[3]Section 5(a)(2) provides that each employer "shall comply with occupational safety and health standards promulgated under this [Act]." Specifically, the Secretary alleged noncompliance with 29 C.F.R. 1910.95(a), the standard requiring employers to provide personal protective equipment for employees exposed to excessive noise, and with former 29 C.F.R. 1910.95(b)(3) (1980) (replaced by 29 C.F.R. 1910.95(c)-(p)), the standard that required an employer to provide an

Petitioner contested the citations, maintaining, inter alia, that OSHA lacked jurisdiction to enforce the Act aboard vessels in navigable waters because the Coast Guard had exercised statutory authority to regulate the working conditions of seamen.[4] Under the Act, OSHA is precluded from regulating the "working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." § 4(b)(1), 29 U.S.C. 653(b)(1). An administrative law judge (ALJ) denied petitioner's motion to dismiss for lack of jurisdiction, finding that the Coast Guard had not regulated the specific working condition at issue — the hazard of employee exposure to excessive noise levels (Pet. App. 49a). A second ALJ affirmed the citations, holding that petitioner knowingly had exposed an employee to the hazard of potentially harmful noise levels in excess of those permitted by regulation and that petitioner had not administered a continuing and effective hearing conservation program (*id.* at 41a-42a).

Petitioner appealed to the Commission, which reversed the ALJ's decision and remanded the case for consideration in light of the Commission's decision in *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982). In that case, a majority of the Commission held that the Secretary

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effective hearing conservation program for employees exposed to excessive noise. Two additional citations, which were vacated by an administrative law judge (Pet. App. 42a-43a), are not at issue.

[4]Petitioner also argued that the Secretary lacked authority to seek the ex parte warrant authorizing the inspection. Finding that the Secretary's regulation, 29 C.F.R. 1903.4 (1978) (subsequently amended in 43 Fed. Reg. 59838 (1978)), provided specific authority to seek the warrant, the court of appeals upheld the Secretary's action (Pet. App. 16a-23a). Petitioner does not seek review of this portion of the court of appeals' decision.

was precluded from enforcing the Act with respect to "the health and safety of seamen aboard vessels operating on navigable waters," because "the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels." *Id.* at 1860, 1861. *The Dillingham* majority noted that the Coast Guard had taken "remedial action" (*id.* at 1862) to correct the hazard at issue in that case —which had resulted in a seaman's death aboard an uninspected vessel — pursuant to its authority to investigate marine casualties. See 97 Stat. 537 (to be codified at 46 U.S.C. 6301).

On remand in the instant case, the ALJ applied the Commission's holding in *Dillingham* and concluded that because the Coast Guard had promulgated "a great many regulations concerning safety," including some regulations affecting uninspected vessels, the working conditions of all seamen are exempt from the Act's coverage (Pet. App. 30a, 28a). The Commission did not act upon the Secretary's petition for discretionary review, and the ALJ's decision therefore became a final order of the Commission. § 12(j), 29 U.S.C. 661(j).

3. The Secretary sought judicial review of the final administrative decision in the court of appeals, pursuant to Section 11(b) of the Act, 29 U.S.C. 660(b). The court of appeals reversed the Commission's decision, holding that vessels in navigable waters are not entitled to an industry-wide exemption from the Act. In the court's view, the Coast Guard's regulation of uninspected vessels was not sufficiently extensive to constitute the "actual exercise of delegated statutory authority" (Pet. App. 7a) required to defeat OSHA's jurisdiction. In reaching this conclusion, the court found a "significant distinction" between Coast Guard regulation of inspected and uninspected vessels: although "pervasive regulation[] by the Coast Guard of safety and

health matters aboard *inspected* vessels eliminates or excludes OSHA's jurisdiction over those vessels" (*id.* at 9a (emphasis in original and footnote omitted)), the "limited" Coast Guard regulations affecting working conditions of employees on uninspected vessels "do not constitute an *exercise* of statutory authority * * * sufficient to oust OSHA of jurisdiction" (*id.* at 8a, 13a (emphasis in original)).

In examining the extent to which the Coast Guard has regulated working conditions of employees aboard uninspected vessels, the court noted that the Coast Guard does not regulate the hazard of noise in engine rooms and has, in fact, "historically viewed its authority to regulate uninspected vessels as limited to the regulation of life-saving and fire fighting equipment, backfire flame control, ventilation, the reporting of casualties and the licensing of operators" (Pet. App. 8a). The court found these "isolated Coast Guard regulations" (*id.* at 13a), which "only incidentally regulate the working conditions of employees" (*id.* at 13a-14a), far less than the exercise of statutory authority contemplated by Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1). Accordingly, the court concluded, "[i]t would do violence to the clear intent of Congress to hold that these instances of Coast Guard regulation of working conditions aboard uninspected vessels would serve to deny an entire class of employees the protection of major safety legislation such as the OSH Act" (Pet. App. 14a).

ARGUMENT

The court of appeals correctly applied well-settled legal principles regarding the operation of 29 U.S.C. 653(b)(1) in reaching its conclusion that the Coast Guard's minimal regulation of employee health and safety on uninspected vessels is insufficient to result in a wholesale displacement of OSHA's jurisdiction over working conditions of seamen aboard such vessels. Moreover, the Coast Guard has taken the position, which petitioner does not challenge, that it

does not have statutory authority to regulate other conditions on uninspected vessels, such as the noise conditions on petitioner's tugboat that were determined by OSHA to constitute a serious violation of the Act (App., 1a-3a, *infra*). The result of petitioner's position therefore would be to exclude the employees on petitioner's uninspected vessels from any substantial safety protection. There is no reason to believe that Congress intended to leave such a gap in coverage when it enacted the OSH Act. Review by this Court therefore is unwarranted.

1. As this Court has recognized, the OSH Act is to be "liberally construed to effectuate [its] congressional purpose" "to prevent occupational deaths and serious injuries." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13, 11 (1980) (footnote omitted). Other courts accordingly have interpreted OSHA's jurisdictional reach expansively, concluding that "[e]mployees should not lightly be denied the protection of OSHA" (*Marshall* v. *Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2d Cir. 1978)), and that 29 U.S.C. 653(b)(1) must "be construed to achieve the maximum protection for the industrial workers of the Nation." *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.), cert. denied, 429 U.S. 999 (1976). Accord, *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386, 392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); *Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d 913, 918 (3d Cir. 1980).

Courts interpreting the statutory exemption have found, on the basis of the legislative history and other factors, that OSHA loses jurisdiction only if the sister agency both possesses statutory power to regulate working conditions of employees and actually exercises that power. The "mere existence" of statutory authority is insufficient. *Southern Pacific*, 539 F.2d at 389-391. Accord, *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Southern Ry.*, 539 F.2d at 336-337. The sister agency must actually

take some steps toward exerting its statutory authority to regulate working conditions. See, *e.g., Ensign-Bickford Co.* v. *OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983), cert. denied, No. 83-1182 (Apr. 16, 1984); *Columbia Gas,* 636 F.2d at 918; *Baltimore & O.R.R.* v. *OSHRC*, 548 F.2d 1052, 1055 (D.C. Cir. 1976).

Moreover, the sister agency's exercise of authority must be directed toward working conditions of employees. In determining whether this requirement is met, courts examine both the purpose served by the agency's exercise of authority and the scope of its regulatory activities. The sister agency's regulations must be designed to protect a class of workers, not to effectuate a wholly unrelated goal. See *Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1169 (D.C. 1975). The courts also have rejected the notion that an entire industry is exempt from the OSH Act simply because a sister agency has issued a few regulations affecting the employee class or, indeed, more comprehensive regulations that affect a separate employee class within the broader industry. *Southern Ry.*, 539 F.2d at 339 (railroad employees in offices, shops, and repair facilities, who are unregulated by the Department of Transportation, are not exempt from OSH Act coverage on an industry-wide basis, even though employees in over-the-road operations are more extensively regulated by the Department of Transportation). As one court of appeals has put it, "the phrase 'working conditions' [does not have] a meaning which never appears elsewhere in OSHA — that of 'industries.' " *Southern Pacific,* 539 F.2d at 390. Accord, *Southern Ry.*, 539 F.2d at 339; *Baltimore & O.R.R.*, 548 F.2d at 1054.[5]

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[5]OSHA's jurisdiction is displaced if the sister agency has addressed the precise hazard at issue, even though it has not done so in the same manner as OSHA. See, *e.g., PBR, Inc.*, 643 F.2d at 896; *Southern*

2. Against this background, the court of appeals correctly concluded that OSHA was not divested of jurisdiction in this case. As an initial matter, petitioner's assertion that the Coast Guard has regulated the working conditions of all seamen is plainly erroneous. The Coast Guard has indeed occupied the field of working conditions aboard inspected vessels,[6] but it has issued only a few regulations that even indirectly affect the working conditions of employees aboard uninspected vessels. As petitioner concedes (Pet. 5-6), the *Stamford* is subject only to regulations governing lifesaving equipment (46 C.F.R. Subpt. 25.25) fire-fighting equipment (46 C.F.R. Subpt. 25.30), navigational warning devices (46 C.F.R. Subpt. 25.05 (1982)),

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Pacific, 539 F.2d at 391. Several courts have further refined the definition of "working conditions." Compare *Southern Ry.*, 539 F.2d at 339 (working conditions include the "environmental area in which an employee customarily goes about his daily tasks"), and *U.S. Air, Inc.* v. *OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982) (same), with *Southern Pacific*, 539 F.2d at 391 (working conditions embrace both "surroundings," expressed as a general problem, and "hazards," expressed as a location, category, or specific item).

Petitioner's sole contention in this case is that the Coast Guard has regulated the working conditions of seamen as a class (Pet. 8-9). Petitioner has not argued that the Coast Guard has jurisdiction in this case because it actually has exercised authority to regulate any specific working condition aboard uninspected vessels. In any event, an examination of the handful of Coast Guard regulations affecting uninspected vessels (see pages 8-9, *infra*) reveals that the Coast Guard has not addressed the specific hazard of noise in engine rooms and has not exercised any authority to regulate generally either engine rooms or noise levels.

[6]Compare 46 C.F.R. Pt. 24 (uninspected vessels), with 46 C.F.R. Pt. 31 (inspection and certification requirements for tank vessels); 46 C.F.R. Pt. 71 (inspection and certification requirements for passenger vessels); and 46 C.F.R. Pt. 91 (inspection and certification requirements for cargo and miscellaneous vessels). Indeed, the Secretary and the Coast Guard have executed memoranda of undertstanding that recognize the pervasive Coast Guard regulation of inspected vessels. See 45 Fed. Reg. 14987 (1980); 48 Fed. Reg. 11365 (1983).

marine casualty reporting (46 C.F.R. Subpt. 26.08), personnel licensing (46 C.F.R. 26.25-1), load lines (46 C.F.R. 42.01-1), nautical "rules of the road" (33 C.F.R. Pt. 80), pollution control (33 C.F.R. Pts. 151-159), and navigational aids (33 C.F.R. Pts. 60-76).[7] Plainly these few regulations affecting uninspected vessels fall far short of the more comprehensive exercise of authority necessary to exempt an entire class of employees from OSH Act coverage. Moreover, as the court below found (Pet. App. 13a-14a), some of these regulations are not even directed at "working conditions," so as to trigger the potential applicability of the exemption. Regulations affecting pollution control, for example, are designed to protect the waters of the United States from discharges of oil and sewage and do not even incidentally protect seamen.

Petitioner does not seriously maintain that the Coast Guard's limited regulation of the uninspected vessel fleet suffices to displace OSHA's jurisdiction. Rather, petitioner appears to merge two discrete classes of employees — those aboard inspected vessels and those aboard uninspected vessels —and concludes that the Coast Guard has regulated the entire industry. This broad conclusion is simply a variation of the notion, consistently rejected by the courts of appeals, that any exercise of authority to regulate working conditions by a sister agency exempts every aspect of the affected industry from OSHA's jurisdiction. See *Southern Pacific*, 539 F.2d at 390; *Southern Ry.* 539 F.2d at 338-339; *Baltimore & O.R.R.*, 548 F.2d at 1054.

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[7]Although the Coast Guard has issued extensive recommendations addressing noise hazards aboard inspected vessels, U.S. Coast Guard, *Navigation and Vessel Inspection Circular, No. 12-82* (June 2, 1982) (see App., 2a, *infra*), uninspected vessels are under no obligation to comply.

It also is significant that, as the Chief Counsel of the Coast Guard explained in his letter to the clerk of the court of appeals in response to the court's inquiry in this case, the Coast Guard has not issued more comprehensive regulations nor addressed the hazard of noise in engine rooms because it believes that "statutory authority * * * to regulate the uninspected vessel fleet * * * beyond those areas presently regulated, does not exist" (App., 3a, *infra*). Thus, the Coast Guard has not simply failed to exercise recognized statutory authority; it maintains that it lacks authority to regulate further.

3. Contrary to petitioner's contention (Pet. 8-10; Supp. Pet. 1-3), there is no conflict among the courts of appeals on the question presented that warrants review by this Court. The decisions of other courts of appeals upon which petitioner relies do not address the significance of the fact that the uninspected vessel fleet is virtually unregulated. Moreover, in each of the cases cited, the holding did not necessarily rest on a finding of a statutory, industry-wide exemption. For this reason, statements in several of the opinions that all seamen are exempt from OSH Act coverage are merely dicta. In the absence of an actual conflict on the issue that is presented in this case, certiorari should be denied. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

In *Donovan* v. *Texaco, Inc.*, 720 F.2d 825 (1983), the Fifth Circuit found that an OSHA employee protection provision could not be enforced aboard a vessel that was inspected and thus was, as the Secretary acknowledged (720 F.2d at 826, 827 n.3), subject to pervasive regulation by the Coast Guard. Because the vessel was inspected, the Secretary conceded that the exemption in 29 U.S.C. 653(b)(1) generally was applicable to the vessel in question, and the scope of the exemption as regards the question presented in this case therefore was not in issue. The only question in

Texaco was whether the employee protection provision was applicable notwithstanding the exemption. The court's broad language that all seamen are exempt from OSH Act coverage was therefore unnecessary to the decision. Similarly, in its prior decision in *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (1980), the Fifth Circuit did not consider the preemption question in the context of whether the vessel involved was inspected or uninspected. The court based its decision in part on a finding that the proffered OSHA regulations did not appear relevant to any working conditions on the vessel involved. *Id.* at 1122. Moreover, the court in *Clary* mistakenly found that the *Commission* "has disclaimed an intention to promulgate standards applicable to seamen." *Ibid.* Because the Secretary, rather than the Commission, has authority to promulgate regulations and because the Secretary has determined that he does have jurisdiction over working conditions of employees aboard uninspected vessels, *Clary's* broad language rested on an erroneous premise.

The Fourth Circuit decisions cited by petitioner also fail to address squarely the industry-wide exemption issue. In *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 (1980), the question was whether Coast Guard regulations applied to longshoremen, not whether Coast Guard regulations applied to seamen. The court held that longshoremen are under the jurisdiction of OSHA, not the Coast Guard. Accordingly, it never considered the distinction between inspected and uninspected vessels and the impact of that distinction on preemption of OSHA's jurisdiction under 29 U.S.C. 653(b)(1) over the working conditions of seamen. The other Fourth Circuit decision, *Barger* v. *Mayor & City Council of Baltimore*, 616 F.2d 730, cert. denied, 449 U.S. 834 (1980), likewise did not address the statutory exemption. There the court held that the Coast Guard, not OSHA, had jurisdiction over the hazard at issue, but the court

rested its conclusion on the ground that the Secretary's regulations themselves excluded seamen from coverage. 616 F.2d at 732. Moreover, the Fourth Circuit has, on other occasions, confirmed that the statutory exemption is activated only by the actual exercise of authority by a sister agency. See, *e.g., Southern Ry.*, 539 F.2d at 336-337.

Finally, in *Kopczynski* v. *The Jacqueline*, 742 F.2d 555 (1984), the Ninth Circuit held that the Coast Guard, not OSHA, had jurisdiction over the particular safety hazard. However, the OSHA regulation that the Jones Act plaintiff sought to invoke (see *id.* at 558) was adopted from regulations issued under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, which, the Court found, expressly excluded seamen from coverage. See 29 C.F.R. 1918.1. See also 742 F.2d at 559, quoting 29 C.F.R. 1915. 2(b).[8] The court's holding does not conflict with the decision below, because in *Kopczynski* the court did not consider whether the vessel in question was inspected or uninspected and did not consider the impact of that classification on the Coast Guard's preemption of OSHA's standards.

Because the decision below is compatible with these holdings of other courts of appeals, petitioner's argument (Pet. 10-12; Supp. Pet. 2) that uninspected vessels will be subject to the OSH Act only within the jurisdiction of the Second Circuit is incorrect. Uninspected vessels remain within the Act's coverage in every jurisdiction until expressly exempted.[9]

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[8]Pursuant to statutory authority (§ 6(a), 29 U.S.C. 655(a)) the Secretary adopted certain longshoring safety and health regulations as OSHA standards. See 29 C.F.R. Pt. 1918.

[9]Contrary to petitioner's assertion (Pet. 12-13), it is the Secretary of Labor, not the Commission, who is charged with administration of the Act. For this reason, it is the Secretary's interpretation of the exemption provision, rather than the interpretation by the Commission, that is

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985

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entitled to judicial deference. Cf. *Whirlpool Corp.*, 445 U.S. at 11 (Secretary's interpretative OSHA regulation deserves deference). In any event, the Commission's decision in *Dillingham Tug & Barge Corp.*, *supra*, is erroneous. The Commission based its decision, in part, on the incorrect assumption that the Coast Guard believes that it has authority to regulate all working conditions aboard uninspected vessels. 10 O.S.H. Cas. (BNA) at 1861 n.8. See pages 3-4, *supra*. Moreover, the Commission stressed that the Coast Guard had exercised its authority to investigate marine casualties following the accident at issue. 10 O.S.H. Cas. (BNA) at 1861. However, the Coast Guard's authority to investigate maritime accidents when a fatality has occurred does not provide it with authority to regulate working conditions of seamen aboard uninspected vessels. The limited power to investigate deaths is the antithesis of true occupational safety and health legislation, which is designed to prevent accidents from occurring in the first place. See *Whirlpool Corp.*, 445 U.S. at 11-12 & n.16.

DOJ-1985-01

APPENDIX

30 Mar. 1984

A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, N.Y. 10007

Dear Mr. Fusaro:

This is in reply to your letter of February 22, 1984 concerning the case of *Donovan* v. *Red Star Marine Service, Inc.*, Nos. 83-4158, 83-4168. Your letter contained four questions, posed by the court, relating to the authority of the Coast Guard to regulate uninspected tugboats.

Section 2101(43) of Title 46, United States Code, defines an uninspected vessel as "a vessel not subject to inspection under section 3301 of this Title that is not a recreational vessel." Section 3301 lists ten categories of vessels which are subject to Coast Guard inspection, while 46 U.S.C. 3309 provides for a certificate of inspection to be issued to a vessel found to be in compliance with law and regulation. The category most likely to include towing vessels (tugboats) is 46 U.S.C. 3301(7), "seagoing motor vessels," defined in 46 U.S.C. 2101(33), as "motor vessel(s) of at least 300 gross tons making voyages beyond the Boundary Line." A seagoing towing vessel of less than 300 gross tons is then, by definition, an uninspected vessel, not included within the provisions of section 3301 and not subject to Coast Guard inspection.

With regard to the court's questions the following is offered:

(1) Does the Coast Guard have authority to regulate noise levels on uninspected tugboats of under 300 tons, such as the "Stamford" and "New Haven"?

No. The Coast Guard's primary authority to regulate uninspected towing vessels (tugboats) is contained in 46 U.S.C. Chapter 41 and 46 U.S.C. § 8904. Regulations applicable to those vessels, contained in 46 C.F.R. Subchapter C, include requirements for lifesaving and fire-fighting equipment, backfire flame control, ventilation, casualty reporting, and licensed operators. Additional regulatory schemes which embody the nautical rules of the road, aids to navigation and pollution compliance requirements also apply to uninspected vessels. The statutory authority for these regulations could not be construed to support Coast Guard regulation of noise levels on those vessels.

(2) Does the Coast Guard exercise such authority if it exists?

No; see (1) above. The Coast Guard has, however, issued recommendations on control of excessive noise, in Navigation and Vessel Inspection Circular 12-82, which are considered appropriate recommendations for uninspected vessels.

(3) Is there any legal reason why OSHA should not regulate noise levels on boats such as these?

But for the decision in *Dillingham Tug & Barge Co.*, 1982 O.S.H. Dec. (CCH) Para. 26,166 (Rev. Comm'n) I am unaware of any decisions or statutory prohibition addressing the issue of whether section 4(b)(1) of the Occupational

Safety and Health Act (29 U.S.C. 653(b)(1)) precludes OSHA regulation of such a condition aboard uninspected vessels.

(4) Can there be joint regulation of such noise levels by the Coast Guard and OSHA?

No. Given the response in (1), above, the Coast Guard is no more empowered to regulate noise levels jointly with OSHA than it is to regulate them independently.

It is my opinion that the statutory authority for the Coast Guard to regulate the uninspected vessel fleet (principally towing vessels, fishing vessels and yachts) beyond those areas presently regulated, does not exist. That our authority is so limited has been the Coast Guard's historical position. Over the past twenty years several attempts have been made to obtain additional grants of authority from the Congress to more comprehensively regulate portions of the uninspected vessel fleet. Congressional action during the same period, most notably the failure to provide additional authority to regulate towing vessels, has evidenced an unwillingness to expand the Coast Guard's authority to regulate towing vessels.

I hope this reply will be of assistance to the court in rendering a decision in the case now before it.

Sincerely,

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Chief Counsel